

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 102 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

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RITURAJ TALKIES

Versus

MAMLATDAR CUM PRESCRIBED OFFICER

Appearance:

1. Special Civil Application No. 102 of 1996
MR SR SHAH for Petitioner No. 1
MR PR ABICHANDANI, AGP, for Respondent No. 1-3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 10/07/2001

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the petitioner running a Cinema in Dhangadhra Town of Surendranagar District has challenged the order dated 2-12-1995 (Annexure F) passed by the Commissioner of Entertainment Tax, Gujarat State confirming the order dated 6-5-1995 (Annexure D) passed by the Collector, Surendranagar under the Gujarat Entertainment Tax Act, 1977 and also consequential demand notices at Annexure H & I requiring the petitioner to pay Rs.2,89,856/-.

2. The petitioner was running a cinema at Dhrangadra. The petitioner had exercised the option for payment of consolidated entertainment tax under sec. 6 of the Act vide application dated 30-12-1993. That application was granted by the Designated Officer by order dated 5-1-1994 (Annexure B) on the basis that the houseful capacity was 712 seats in one show. Subsequently, by order dated 4-5-1994 (Annexure C) the Designated Officer determined the lumpsum entertainment tax at Rs. 9082/- on the basis that the petitioner had reduced the houseful capacity of the Cinema Hall to 510 seats in one show w.e.f. 17.3.1994. It appears from the said order dated 4-5-1994 (Annexure C) that in case of consolidated entertainment tax, the amount of weekly tax was determined at the rate of 35% of the gross receipts for one houseful show multiplied by 24 shows irrespective of the number of shows held in a week as against computation of tax under sec. 3 (1) at the rate of 50% of the ticket proceeds for 28 shows in a week if the cinema owner did not opt for the consolidated tax option.

Thereafter, the petitioner submitted an application dated 2-9-1994 (Annexure A) informing the Designated Authority that the petitioner was going to close the cinema from 2-9-1994 for an indefinite period and, therefore, the petitioner was not liable to pay any tax from 2-9-1994 onwards. On 10-4-1995, the petitioner submitted an application to the Collector of Entertainment Tax stating that the petitioner may be permitted to restart the cinema from 14-4-1995. That application came to be granted subject to the condition that the petitioner was to pay the tax liability for the period from 2-9-1994 to 13-4-1995 at Rs. 2,89,856/-. The Collector noted in the said order dated 6-5-1995 (Annexure D) that under the Government circular dated 21-4-1993 exemption could not be granted to a cinema owner from payment of lumpsum tax for the period during which the cinema remained closed for any reason whatsoever.

Aggrieved by the said order, the petitioner went in revision before the Commissioner of Entertainment Tax. The Commissioner rejected the same by his impugned order dated 2-12-1995 (Annexure F) on the ground that under the circular dated 21-4-1993 exemption could be granted from payment of consolidated entertainment tax only if the cinema owner had to keep the cinema closed for more than a week on account of circumstances beyond his control such as natural calamities, riots etc.. The Commissioner noted that if the cinema was required to be closed down

for economic reasons, such a closure was not covered by the circular dated 21-4-1993 for the purpose of granting the benefit of exemption from the payment of entertainment tax.

3. When this petition came up for admission hearing on 9-1-1996, this Court passed the following order:

"Rule. Ad-interim relief in terms of paragraph 14 (B) on the condition that the petitioner deposits an amount of Rs.1 lakh (one lakh) within two weeks from today in the office of Mamlatdar, Dhrangadra. If the amount is not so deposited the ad-interim relief shall stand automatically vacated."

It is in view of the aforesaid ad-interim order which has continued till date, that the petitioner is running his cinema in question. The learned counsel for the petitioner states that the petitioner has complied with the aforesaid condition imposed by this Court while granting the ad-interim relief.

4. At the final hearing of this petition, Mr. S.R. Shah, learned counsel for the petitioner has made the following submissions:-

4.1 The Collector of Entertainment Tax as well as the Commissioner of Entertainment Tax have proceeded on the erroneous basis that consolidated tax liability continues even when the cinema is closed. It is submitted that the provisions of sec. 6 are required to be read in the context of the provisions of sec. 3 of the Act which is the charging provision. It is submitted that what the petitioner is invoking in the instant case is not any exemption from payment of entertainment tax but a declaration that the petitioner was not at all liable to pay entertainment tax as the cinema was closed from 2-9-1994 to 13-4-1995.

4.2 Strong reliance is placed on the decision of the Apex Court in Excel Wear vs. Union of India AIR 1979 SC 25 in support of the contention that a person has a fundamental right to close his business as much as he has a fundamental right to start a business. It is submitted that when the petitioner informed the authorities that he was closing the cinema for an indefinite period, and when the cinema was accordingly closed for the aforesaid period, there was no liability to pay any entertainment tax.

4.3 Reliance is also placed on the decision of this Court in *Shrirang Touring Talkies vs. State of Gujarat* 1995 (2) GLH 971 in support of the contention that entertainment tax can be levied if the cinema house provides entertainment and that the liability will not be there if the cinema is not run.

4.4 The question of following the procedure under sec. 6 (6) of the Act will arise only if the cinema owner continues to run the cinema and merely decides to change the option. It is submitted that it is only if the cinema owner who had earlier exercised the option of paying consolidated entertainment tax continues to run the cinema and decides to pay the tax under sec. 3 on ad valorem basis then only the question of following the procedure for revoking the option under sec. 6 will arise.

4.5 Since the liability to pay the consolidated tax is on weekly basis as contemplated by sec. 6 (5) of the Act, the liability to pay the consolidated tax and its computation is also required to be made on weekly basis and therefore once the petitioner gave intimation dated 2-9-1994, the liability to pay the entertainment tax did not accrue from 2-9-1994 onwards.

5. On the other hand, Mr. P.R. Abichandani learned Assistant Government Pleader appearing for the respondents has vehemently opposed the petition and has submitted that the petitioner having exercised the option for consolidated tax scheme with open eyes cannot be permitted to opt out of the tax liability without following the procedure prescribed by sec.6 (6) of the Act and that the liability to pay consolidated tax would continue irrespective of the fact whether the cinema is actually run or not. Consolidated tax was at the relevant time only 35% on the houseful capacity calculated for a period of 24 shows in a week irrespective of the number of shows actually run as against 50% entertainment tax on the actual gross receipts for all the 28 shows in a week. It is further submitted that the petitioner had also stated before the Commissioner of Entertainment Tax that the petitioner was willing to pay the tax amount for the closure period and he had even prayed for time/installments as per his application dated 10-4-1995.

6. Statutory Provisions:

Sec. 3 : Tax on payments for admission to

entertainments

(1) There shall be levied and paid to the
State Government on -

(a) every payment for admission to an
entertainment, other than the payment for
admission referred to in clause (b), a tax, at
the following rates, :-

xxx xxxx xxxx xxxx
xxx xxxx xxxx xxxx

Sec. 6 : Consolidated payment of tax. -

[(1)] The State Government may, on the
application of a proprietor of any entertainment,
.... in respect of which tax
is payable under sub-sec. (1) of Sec. 3, allow
the proprietor on such conditions as the State
Government may impose, to compound the tax
payable in respect of such entertainment for a
fixed sum.

(emphasis supplied)

[(2) Notwithstanding anything contained in
sub-sec. (1) of Sec. 3, every proprietor of a
cinema in a [xxx] specified area shall have an
option of payment of tax at the rates specified
ins sub-sec.. (5) to be exercised as provided in
sub-sec. (3) within ninety days from the date of
commencement of the Gujarat Act 13 of 1993 (i.e.
1.10.1993) and any person who becomes a
proprietor on any day after the date of such
commencement may exercise such option within
ninety days from the day on which he becomes the
proprietor:

Provided that an application under sub-sec. (3)
may be entertained by the prescribed officer
after the expiry of the period specified in this
sub-section if the applicant satisfied the
prescribed officer that he had sufficient cause
for not making application within such period.

(3) A proprietor of a cinema desiring to
exercise the option referred to in sub-sec. (2)
shall make an application to the prescribed
officer in such form as may be prescribed to

permit him to make, in lieu of the amount of tax payable by him under sub-sec. (1) of sec. 3, payment of tax at the rates specified in Schedule-I.

(emphasis supplied)

- (4) On an application made under sub-sec. (3) the prescribed officer may grant such permission and thereupon subject to sub-sec. (6), the payment of tax shall be made accordingly.
- (5) Where a proprietor has been permitted to pay tax under sub-sec. (4) he shall be liable to pay tax weekly at the rates specified in the Schedule-I irrespective of the number of shows held in a week.
- (6) (a) A proprietor of a cinema who had opted for payment of tax under sub-sec. (2) may at the time but not before the expiry of a period of twelve months from the date of commencement of option give a notice in such form and in such manner as may be prescribed, addressed to the prescribed officer, to revoke his option:
- Provided that any proprietor of a cinema who has opted for payment of tax at any time before 1.10.1993 may at any time but not before the expiry of a period of three months from the date of commencement of option give such notice to revoke the option.
- (b) The option shall stand revoked on the expiry of 30 days after the receipt of notice by the prescribed officer under clause (a).
- (c) Notwithstanding anything contained in sub-sec. (2), a proprietor of a cinema who has revoked his option, may at any time but not before the expiry of a period of twelve months from the date of revocation of the option exercise the option referred to in that sub-section.

7. Having heard the learned counsel for the parties, this Court is of the view that there is some substance in the contention urged by Mr. S.R. Shah for the

petitioner that liability to pay entertainment tax, whether under sec. 3 of the Act or under sec. 6 of the Act by way of consolidated tax, arises only when the cinema is run. Section 3 expressly states that tax shall be levied and paid on every payment for admission to an entertainment. Section 6 provides for consolidated payment of tax. Subsection (1) of Section 6 empowers the Government to allow the proprietor of any entertainment, in respect of which tax is payable under subsection (1) of section 3, to compound the tax payable in respect of such entertainment for a fixed sum. It is thus only to facilitate the computation and collection of entertainment tax amount that the cinema owner is given the option of making consolidated payment of tax. Even in the case of Shrirang Touring Talkies (supra) this Court has taken the view that entertainment tax has to be levied and paid in respect of "an entertainment by cinema". "It needs no telling that an entertainment by cinema can be had if cinema runs and, therefore, entertainment tax can be levied and paid if a cinema house provides entertainment". The taxing event being receiving payment for admission to an entertainment, the liability to pay entertainment tax would not arise if the cinema house is closed for more than a week.

Of course, it is true that if a cinema owner has opted for the consolidated tax scheme and out of 28 shows in a week even if 27 shows are not run in a particular week, the liability of such a cinema owner to pay consolidated tax will be there on the basis of the predetermined computation under sec. 6. (for instance, at the rate of 35% of the houseful capacity for 24 shows in a week as in the instant case). Hence, if the cinema owner gives an intimation to the authorities that he is closing the cinema in the middle of the week, his liability to pay the consolidated tax for that week (the entire week) will remain. However, from the date of commencement of the next week, the liability to pay entertainment tax will not arise if the cinema house is closed continuously for more than a week with an advance intimation already having been given to the authorities. It is, of course, always for the authorities to decide on the facts of a given case whether the cinema house was actually closed after the intimation was given by the cinema owner about the future closure. However, it is not the case of the authorities that in the instant case the cinema house was actually run after the intimation between 2-9-1994 and 13-4-1995.

8. It is necessary now to deal with the contention of learned AGP, Mr. Abichandani, that holding that the

petitioner was not liable to pay consolidated tax between 2-9-1994 and 13-4-1995 would amount to permitting the petitioner to revoke the option for payment of consolidated tax before expiry of the twelve month period stipulated in sec. 6 (a) of the Act. The learned AGP has vehemently submitted that since the date of commencement of option for payment of consolidated tax under sec. 6 (2) was 1-1-1994, the petitioner cannot be permitted to escape liability for the tax till 31-12-1994 except in case of natural calamities or riots as contemplated by the circular dated 21-4-1993. In short, it is contended that in view of sec. 6 (a) even a notice of closure cannot be given before completion of the twelve month period.

9. The argument, even though appears to be ingenious in the first blush, is still another facet of the same argument dealt with earlier. Once it is clear that all that section 6 provides is consolidated payment of tax otherwise payable under sec. 3 (1) on payment received by cinema owner for admission to an entertainment and once it is shown that after advance intimation the cinema remained closed for more than a week, there would be no liability of tax for the period of closure beyond one week. The twelve month limit stipulated in subsections (a) and (c) of section 6 only prevents the cinema owner from resorting to frequent changes in the mode of payment of tax, otherwise the cinema owner will keep changing the options depending on whether the movie being shown in his cinema is a box office success or a failure. In case of movies with prospects of box office success, he would be inclined to go for the option of consolidated payment of tax and in case of movies with box office failure or average performance, he may be inclined to revoke the option and go for tax liability at the rates stipulated in section 3 (1) of the Act. It is in order to obviate this kind of situation that clauses (a) and (c) of section 6 impose the twelve month time limit for changing the options.

When the Division Bench in Shrirang Talkies' case (supra) referred to the requirement of following the procedure under sec. 6 (6) of the Act, it has to be construed as reference to the mandatory nature of giving notice of closure in the form and in the manner prescribed for revoking the option, otherwise if such advance notice is not given, the authority would not be able to verify whether the cinema was actually closed or not.

The argument of the learned AGP would have been

valid only in a hypothetical case where the petitioner having exercised the option under sec. 6 (2) w.e.f. 1-1-1994 and having closed the cinema on 2-9-1994 had reopened it in October or November, 1994 and had sought to revoke the option for any period prior to 1-1-1995.

10. In view of the above discussion, this petition is allowed. The impugned orders dated 4-5-1995 and 2-12-1995 at Annexure 'D' & 'F' respectively and the consequential notices at Annexure H and I are hereby quashed and set aside and the respondents are directed to refund the amount deposited by the petitioner with the Commissioner of Entertainment Tax at the time of filing the revision application (which culminated into the impugned order at Annexure 'F') and also the amount of Rs.1 lac paid by the petitioner in compliance with the Court's ad-interim order dated 9-1-1996. However, in the facts and circumstances of the case, the learned counsel does not press for any interest on the amount of refund if the amount is refunded to the petitioner within two months from the date of service of the writ of this Court or a certified copy of this judgment, whichever is earlier.

Rule is made absolute to the aforesaid extent with no order as to costs.

zgs/-